Constitution and advancing domestic workers' rights

It is well known that it is difficult to organise and bargain on behalf of domestic workers. **Halton Cheadle** points out that this means that domestics are not treated equally with other workers and do not realise their rights under the Constitution. He poses some useful and exciting ways for domestic workers to gain the rights to which they are entitled.

There is much debate in legal circles about the transformative qualities of a constitution. This debate is judge-centred and revolves around who the judge should be and how a judge can give effect to the transformative aspects of a constitution and what qualities a judge needs to do this. But I want to ask a different question: What would an activist do to give effect to the transformative aspects of the constitution? How would a modern day Lillian Ngoyi or a Myrtle Witbooi use the constitution to achieve the promises of the constitution?

The South African Constitution promises everyone the right to equal treatment and *all* workers the right to fair labour practices and the right to organise, bargain and strike. Domestic workers did not have these rights before the introduction of the new Constitution – they were excluded from the old Labour Relations Act (LRA) and Basic Conditions of Employment Act (BCEA). Under the new LRA and BCEA domestic workers now have labour rights but are they treated equally?

Being treated the same as other workers does not necessarily mean that domestic workers are *treated* equally. Although they may now formally have the rights under the LRA and the BCEA, are domestic workers able to exercise those rights meaningfully?

DOMESTICS BARGAINING COLLECTIVELY

Let's begin with the right to join trade unions and bargain collectively. Domestic workers have these rights but can they exercise them?

It is very difficult to organise domestic workers. The reasons are easy to see. They are invisible hidden in homes behind walls and unlike the organisation of a mine, a factory, shop or office where workers are concentrated, domestics are dispersed one or two per home making it difficult to recruit and organise. This also means that there are almost as many employers as there are employees in the sector making the organisation of employers just as difficult.

Everyday experience confirms this. Trade unions representing domestic workers are small and struggle to retain a base and there are no employer organisations representing domestic employers. This means that collective bargaining is virtually impossible in the domestic sector. There can be no sector level bargaining without unions and employer organisations and collective bargaining on a household to household basis is not collective. Domestic workers have the right to collective bargaining but cannot exercise it.

Yes, domestic workers have formal equality. But the Constitution promises more – it requires substantive equality. Formal equality ignores domestic workers' economic and social situation. Substantive equality however examines the efficacy and impact of these laws on domestic workers and requires the law to take account of the systemic differences in their treatment compared to other workers.

At a structural level, it is important to recognise that many employers of domestic labour are themselves workers. The domestic worker is often competing with the wages of the employer – if his/her wages get

too high more often than not the wife or mother takes over. This places a huge restraint on the capacity to organise, set standards, and enforce compliance.

At a legal level, the BCEA establishes minimum standards for all workers including domestic workers. But the BCEA's system of standard setting and its monitoring and compliance procedures do not take account of the specific problems faced by domestic workers.

This problem is the lowest common denominator approach to the setting of standards. This is a consequence of setting standards at a national level, the non-compliance by most domestic employers, the lack of adequate inspection or monitoring of the workplace, that domestic workers have little knowledge of their rights and that few domestics, trade unions exist and few workers join them, and that there are no centralised bargaining forums for this sector.

Part of the problem is the national process of setting standards and reliance on a national inspectorate that is focused on factories, mines, shops and offices.

It is clear that labouring under such conditions does not meet the goals of the Constitution so the state and its judges need to go further.

IDEAS ON GOING FURTHER

Because there is no real prospect of effective collective bargaining in the domestic service sector, standard setting under the BCEA, including the setting of minimum wages, must be tailored to allow for maximum participation by domestic workers, their trade unions and non-governmental organisations (NGOs).

Standard setting must be brought to the local level both in content and process. The Employment Standards Commission (ESC) should take steps to reach domestic workers, their employers and their organisations by adopting a much higher profile through public advertising and by inviting their participation in the setting of minimum wages.

Also trade unions and NGOs should mobilise workers and make representations on their behalf in much the same way as the unions in the 1970s and 1980s used wage board hearings to make their voices heard.

Wage boards were used by activists to mobilise workers who had no collective bargaining voice or structure. They invited the media to these hearings in order to get maximum publicity on workers' poor conditions and low pay. Nowadays such tactics are seldom used which leaves sectors like domestic workers voiceless. There is the real possibility of activists mobilising around ESC hearings to highlight the poor work conditions and pay of domestics

The local level is critical. Domestic workers' wages, for example, in Cape Town are higher than in the rest of the country so why should employers only pay the national minimum? The responsibility for setting standards should not be left to the ESC alone. There is no reason why local government cannot set minimum wages in excess of those set by the ESC. There is no reason why local government cannot ensure decent standards of accommodation for live-in domestic workers and establish a retirement scheme for domestics.

Implementing a pension scheme by local government is a real possibility because municipalities register every household for the payment of services like water, electricity and rates. So if minimum conditions were agreed on locally it would be relatively easy for municipalities to monitor domestics' conditions of work and to get contributions from employers of domestic workers towards a local government pension scheme.

Domestic workers could harness their voting power at the local level in municipal elections and threaten to throw a party out of office if it doesn't implement demands for decent working conditions including a locally run pension scheme or local government participation in a national scheme.

Every household in a municipality that employs a domestic worker would be required to register. The local council would then have a record of how many domestic workers laboured in each home, what they were paid and where they were. Local government could also collect UIF contributions in this way making it easier for domestic employers to comply with their obligations – though this may need a statutory amendment to the Unemployment Insurance Act.

Finally, what the state cannot do, judges can.

In their judgements judges can take account of the economic and social cleavages in domestic workers' contracts of employment. Professor Cathi Albertyn has in her publications on the right of equality spoken of the inequality in tax laws where it is possible to deduct entertainment expenses but you cannot deduct expenses for childcare which is a necessary expense to permit parents to work.

The unions and the NGOs should mobilise the trade union movement and political parties for a change to tax laws for a childcare tax rebate. Such a rebate would release the pressure of paying decent wages to domestic workers and may also lead to greater use of domestic labour to permit both parents to work. If political parties are resistant to the idea, domestic worker organisations should approach the courts to challenge the omission of a tax rebate for childcare or domestic work in general. LB

Halton Cheadle is an ex-trade unionist, a trade union lawyer and now a professor of public law at the University of Cape Town. He was the convenor of the Ministerial Task Team that drafted the LRA in 1995.